UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

FILED
CLERK
11/20/2015
U.S. DISTRICT COURT
EASTERN DISTRICT OF NEW YORK
LONG ISLAND OFFICE

-------------------------------X

UNITED STATES OF AMERICA, Plaintiff,

v.

THE TOWN OF OYSTER BAY. et al, Defendants.

-------------------------------X

14-CV-02317 (ADS)

October 30, 2015
Central Islip, New York

TRANSCRIPT OF CIVIL CAUSE FOR STATUS CONFERENCE
BEFORE THE HONORABLE STEVEN I. LOCKE
UNITED STATES MAGISTRATE JUDGE

APPEARANCES:

For the Plaintiff: MICHAEL J. GOLDBERGER, ESQ.
SEAN GREENE, ESQ.
United States Attorneys Office
271 Cadman Plaza East
Brooklyn, New York 11201

For the Defendants: CHRISTIAN J. PISTILLI, ESQ.
Covington & Burling LLP
1201 Pennsylvania Avenue NW
Washington, DC 20016

Court Transcriber: MARY GRECO
TypeWrite Word Processing Service
211 N. Milton Road
Saratoga Springs, New York 12866

Proceedings recorded by electronic sound recording, transcript produced by transcription service

(Proceedings began at 1:53 p.m.)

THE COURT: We are here for the parties' status conference. Mr. Goldberger, where are we?

MR. GOLDBERGER: Your Honor, we are well underway with discovery, well into discovery. We have exchanged interrogatories and document requests a while ago. Responses have been provided and the parties have clarified responses. There's been a second set of requests served by the defendant and we're about to do the same to get some clarification on the interrogatory responses.

We have conducted four depositions so far. Those depositions have made clear that we're going to need a substantial number of additional depositions and we have noticed those depositions to the other side to be conducted between now the beginning of December. Your Honor, it is a substantial number. As we had indicated earlier, we believe that we need approximately 20 depositions in this case, and I'm happy to explain that in detail to Your Honor. We have a list of the people and the reasons why we need those depositions.

THE COURT: Before you do, let's see what the defendant's position is on the extra depositions.

DEFENDANT'S ATTORNEY: We think they're entirely unnecessary and we also think that the notices are procedurally improper.

THE COURT: Okay.

DEFENDANT'S ATTORNEY: At the earlier status conference Your Honor said it's limited to ten, Mr. Goldberger, do your ten. If you need more, put in a motion. He hasn't done that and he's noticed 20 depositions.

THE COURT: In that case we're going to need to move forward. You can tell me about them.

MR. GOLDBERGER: Sure, Your Honor. If I may just hand up a list it'll be easier I think to follow. I'll be able to explain it.

THE COURT: Do you have a copy for your adversary?

MR. GOLDBERGER: I have a copy for counsel.

THE COURT: Sure. That's fine. Mr. Pistilli, do you have a list?

MR. PISTILLI: Yes, I do.

THE COURT: All right. Let's continue, Mr. Goldberger.

MR. GOLDBERGER: Okay. Your Honor, at issue in this case are two separate government programs in the town of Oyster Bay, one called Next Generation which is intended to benefit young or first time home owner families. The second is the Golden Age Program which was implemented to provide affordable housing to senior citizens.

One of the big questions in this case is the decision making processes around the residency preferences that were implemented in both cases. There's no single individual or single entity that made that decision. It was a governmental entity which made the decisions. The documents made quite clear that there were a large number of people who were involved in the decision making process. We started our depositions with people we thought would have some of that fundamental information. What we have learned that it is fragmented, (A), and (B), the people we thought were sort of in the leadership on this thing turn out to say that they have limited knowledge, or in one case which I'll raise in a little bit, hid behind the attorney-client privilege in trying to avoid having, or at least not answering questions about that decision making process.

THE COURT: Do the people who you describe as having limited knowledge point to somebody else as having the driving knowledge?

MR. GOLDBERGER: Well, yes. There does seem to be an individual who had some of that driving knowledge. He was a consultant to the town. His name is David Portman and he is actually listed at the bottom of this list, Your Honor. We have actually not noticed Mr. Portman's deposition yet and I'll explain why. Mr. Portman, when this first started, Mr. Portman was retired. We understood that he was no longer at the company that he had been at. We ask counsel if they had a contact information for Mr. Portman. It took at least a couple of months before they finally got back to me and said Mr.

Portman is represented by counsel, a man named Charles Goldberger, no relation. And Mr. Goldberger then -- I contacted Mr. Goldberger and Mr. Goldberger said, "I've known Mr. Portman for years, I've represented him for years. He lives in Florida. He has Parkinson's so there's some limitation on his ability to travel." I said, "We'll go to Florida. That's fine." He said, "But I don't know that I'm going to represent him. I think that Covington and Burling is going to represent him." So we've been waiting to hear back from Covington and Burling to find out whether he's represented or whether we need to issue a subpoena or whether Mr. Goldberger or someone else. But once I'm told that someone is represented by counsel, obviously I cannot contact that person directly. So we've been waiting on Mr. Portman --

THE COURT: We're going to find out right now. Do you represent Mr. Portman?

MR. PISTILLI: As of yesterday we represent Mr. Portman. We expect to have an engagement letter signed on Monday.

THE COURT: Okay. So you'll respond. From now you're on for Mr. Portman. Work with each other, figure it out, location and everything else.

MR. GOLDBERGER: That's fine, Your Honor. We're happy to go to Florida particularly now that the weather has gotten cold.

The other individuals who are on our list are for the Next Generation Program. We've taken the depositions of the director and the commissioner and deputy commissioner at the time of Community Planning and Development. They profess limited knowledge and they're the ones who pointed to Mr. Portman primarily.

The other individual who might have some knowledge is the successor commissioner who is Jack Libert who's the next person on our list.

THE COURT: You say that because that was what was suggested in the initial depositions.

MR. GOLDBERGER: And by the documents, Your Honor.

THE COURT: Okay.

MR. GOLDBERGER: The next chunk are the people who are the town council members. They are the people who vote. The first person on the list is Anthony Mackinyone [Ph.]. Mr. Mackinyone was the person who actually proposed the program to begin with, who's the legislator who rode herd on that legislation from what we understand. And certainly we're trying to get an understanding of what the town intended with this program and with this residency preference. They're not going to be long depositions. I wouldn't even think they'd go more than an hour or two. But they're depositions that we need to take in order to get that information.

THE COURT: Okay. Let's take a break from that there. Mr. Pistilli, why don't you tell me about Mr. Portman? What's your objection to him being deposed?

MR. PISTILLI: I have no objection to Mr. Portman.

THE COURT: Okay. What about Mr. Libert? What's your objection?

MR. PISTILLI: Mr. Libert is the successor commissioner of the Department of Planning.

THE COURT: Right.

MR. PISTILLI: We indicated in our discovery responses we didn't list anybody from the Department of Planning because they have no material role in the facts relevant to this case. The government nevertheless took the deposition of the Commissioner and the Deputy Commissioner of Planning who were in place at the time the Next Generation legislation was passed.

THE COURT: Right.

MR. PISTILLI: They didn't know anything. They did not point to Mr. Libert as someone who would know anything.

THE COURT: So we have a disagreement there.

MR. PISTILLI: Yes.

THE COURT: I mean you say he did point to him, Mr. Libert --

MR. GOLDBERGER: Well, I think there was some indication that Mr. Libert might have some knowledge about how the program was created. Mr. Destefano, who had been the commissioner I believe, transitioned out during the course of the program.

THE COURT: Well right, but either he suggested Mr. Libert had knowledge or he didn't suggest that.

MR. GOLDBERGER: Well, I'm not sure. I think he did, first of all. I disagree. We do have a disagreement. But more importantly, there are documents that have Mr. Libert's name on it that discuss the program.

MR. PISTILLI: All those documents, Your Honor, post date the enactment of the program. Remember --

THE COURT: Postdate the --

MR. PISTILLI: The enactment of the Next Gen Program. So to the extent --

THE COURT: Well that doesn't -- why is that dispositive?

MR. PISTILLI: Well, the principle thing that Mr. Goldberger has been attempting to establish so far unsuccessfully in the depositions is that the program was enacted with a discriminatory intent. This is the man who took over after the program was enacted. His department oversaw a contract that had administered the program but I hardly see why that makes it necessary to take the third deposition of someone from that department especially when the deputy in place during both Mr. Destefano and Mr. Libert's tenure who had principle responsibility has already been deposed.

THE COURT: The question is whether or not he'd have relevant information going to the case. He's not a -- is he a defendant?

MR. GOLDBERGER: He's not a defendant.

THE COURT: Well then I don't think that that's the standard, is it?

MR. PISTILLI: So it is not the case that a party is entitled to a deposition of someone merely because they have relevant information. There is a limit of ten depositions in place and it's Mr. Goldberger's obligation to establish good cause to exceed that limit. If he wants to use one of his ten on Mr. Libert, you know, we wouldn't be seeking a protective order. But I think cumulatively the 21 are likely to prove to be cumulative and of extraordinary little probative value in the case. So I don't think the real question here is whether any single deponent is appropriate. The question is whether he's established good cause to get more than double what Your Honor ordered.

THE COURT: Well then that's significant. So the undercurrent of the defendant's objections is the fact that ten are exhausted and there isn't good cause to go to 11. Is that fair to say?

MR. PISTILLI: The ten aren't even anywhere nearly exhausted yet. Contrary to Your Honor's order he's only taken four. If he takes his ten and says he needs more and puts in a motion as Your Honor ordered, then we can have that fight. As of now it's totally premature to say he needs to double the number that were ordered at the last status conference.

THE COURT: Okay. So is that fair to say you've taken four so far and you're looking down the road and figuring like this is going to be way more than ten?

MR. GOLDBERGER: Right, Your Honor.

THE COURT: Okay.

MR. GOLDBERGER: And I think the other fact of the matter is that we have a discovery cutoff that we need to try to meet and that it's certainly relevant to us to take the depositions of everyone who might have knowledge. And the fact that someone has implementation responsibility for the Next Generation Program rather than creation responsibility doesn't mean (A), that they didn't have responsibility for other things that might be relevant to the program is discriminatory --

THE COURT: Well, he's already essentially said I'm not objecting on the basis of relevance.

MR. GOLDBERGER: Right. Okay. Right.

THE COURT: So it's just a question of number. It seems to me now that I understand this a little better that you've got six more depositions no matter what. Assume that you would get an extension of discovery deadline, all right? So that perhaps we can attack this in waves.

MR. GOLDBERGER: Okay.

THE COURT: If you were to take the next six and they'll reveal some information of some kind and then you say I need more of the following subset of people on this list, we can talk about it then. And what I'm going to ask is why don't you tell me how long you need to get those depositions and we'll set it down for a status conference and then hopefully you'll attend the status conference with a -- we'll have a more fleshed out plan in terms of here's where we are, here's how I'd like the roadmap to go forward. Mr. Pistilli, you'll say I don't like that roadmap and here's why. And then we'll do it then.

MR. GOLDBERGER: Fair enough, Your Honor. I think we can get the six depositions done in the next month, Your Honor. I don't think that's going to be much of a problem.

THE COURT: So we'll have you back in call it a little over 30 days. Mr. Pistilli, you around?

MR. PISTILLI: Yes, yes. I would think just for the Court's convenience.

THE COURT: Sure.

MR. PISTILLI: And the problem is we've had these 21 notices outstanding. We thought that was a crazy number. And so once we know who the actual six are, we need to talk to them and discuss availability. The holidays are approaching. I'm going to try to get them done in the next 30 days. I don't think that's unreasonable. But I would hate to have a status set and have us for whatever reason not have --

THE COURT: Look, I can give you a status date and you can say we've got three and three guys are out of town for the holidays, can we do it in --

MR. PISTILLI: Okay. I just --

THE COURT: Don't be overly concerned about that kind of stuff with me.

MR. PISTILLI: Okay.

THE COURT: That won't be a problem. I'll give you more than 30 days though just to accommodate them. Let's see. We're at October 30th. Why don't we say the week of December 14th for a status conference?

MR. GOLDBERGER: That sounds great, Your Honor.

THE COURT: So that's -- you need a little extra wiggle room. If we need to adjourn it to January, you'll let me know. Try to give me a couple of dates you're available because I have a few trials in January and I'm going to try to slot you in as best we can. The week of the 14th.

THE CLERK: December 15th.

THE COURT: December 15th at --

MR. GOLDBERGER: Your Honor, if we could push it to the latter part of that week? I'm going to be out the week before into that week.

THE COURT: Okay.

MR. GOLDBERGER: So if it's possible to do it like

Thursday or Friday of that week it would be terrific.

THE COURT: Sure. How about Friday the 7 --

THE CLERK: 18th.

THE COURT: Friday the 18th at?

THE CLERK: 10 a.m.

THE COURT: 10 a.m. All right. So the docket is just going to state that there was a status conference. We'll come back then. You'll have as much time as you can. If you need a little more time for the holidays, just write a joint letter.

MR. GOLDBERGER: Great.

MR. PISTILLI: Yes.

MR. GOLDBERGER: Great. Thank you, Your Honor.

THE COURT: Is that the only outstanding issue basically the depositions?

MR. GOLDBERGER: That was I think the key issue, Your Honor. There are some other things that we want to do that Mr. Pistilli and I discussed that we did want to flag for the Court.

THE COURT: Go ahead.

MR. GOLDBERGER: There are some issues concerning attorney-client privilege that have been raised. In the course of my asking one of the consultants to the town who we thought was fairly key about his knowledge and about what was discussed, not what was discussed so much as what his knowledge was of the Fair Housing Act, of discrimination, and what was considered, the response was I don't know anything other than what my counsel told me, and therefore was essentially saying that -- invoking the attorney-client privilege. That came up several times during the course of his deposition. That's something that we're willing to put in abeyance now and not raise before Your Honor yet until we get further down in discovery and see where things stand and whether we can get around that issue with other questions of individuals. But it may be an issue at some point.

There's also the issue of possibly having to take the deposition of attorneys who represented the town to get at what they did know and what they didn't know.

THE COURT: Okay. Well, we'll deal with that. To the degree it requires motion practice, maybe we can tee that up in the next conference and I'll give you the schedule to submit either letter motions. If this looks like it needs to be briefed, that's fine. Just let me know and we'll essentially give you a more full blown --

MR. GOLDBERGER: Sure.

MR. PISTILLI: I would think it would need to be briefed.

THE COURT: It may. So we'll do it. All right? Mr. Pistilli, anything else?

MR. PISTILLI: Yes. There was one issue we wanted to raise which was the location of depositions. Each of the outstanding 16 notices, and I think it's going to be winnowed down to six notices in Brooklyn and Mr. Goldberger's office is the location of the depositions.

THE COURT: Okay.

MR. PISTILLI: We believe that the Town of Oyster Bay as the headquarters of the municipal corporation is the appropriate location for the depositions. I'm happy to put in a letter motion to Your Honor if you prefer, but it seems like --

THE COURT: Well Mr. Goldberger, what about it? In the case of municipalities there is some case law suggesting that you've got to go to the municipality.

MR. GOLDBERGER: There is, Your Honor, and I think what we have said to counsel is that we're flexible. The first two depositions were of consultants. I took one out here, one up in White Plains in the White Plains courthouse as a matter of fact. What I've said to counsel is that we prefer to take the depositions in Brooklyn where I happen to have my main office. Obviously I work out here as well.

THE COURT: Right.

MR. GOLDBERGER: I'm happy -- and if counsel has a particular reason why a particular person needs to travel out here rather than into Brooklyn, we can certainly work that out. I'm flexible and I'm certainly cognizant of different people's needs. Obviously in the case of Mr. Portman we will go to Florida.

However, the way it started was counsel refused to produce anybody in our office initially and insisted on it being done either here or in Town's offices. The Town of Oyster Bay headquarters is actually equidistant between the two courthouses.

THE COURT: Is actually --

MR. GOLDBERGER: Equidistant between the two courthouses. So while there may be a preference on the part of that particular witness, and we certainly wouldn't want to disrupt the -- and I think the case law you're referring to, Your Honor, talks about disruption to the town's activities and conduct --

THE COURT: Correct, and typically with law enforcement.

MR. GOLDBERGER: Right. You know, that's not -- I don't think that's the case in this circumstance and certainly given the amount of time that's going to be involved in some of these depositions, if we're talking about taking the council members' depositions all in one day or in two days, that's something where we might be able to do that out there, the least inconvenience and do everything condensed. But I think that there are other circumstances where we do have the right to take the deposition -- the presumption is the deposition is going to be held where the deposition is noticed. This is still in the Eastern District of New York. And as I said, we're willing to be flexible but I think counsel has to be reasonable.

MR. PISTILLI: Well --

THE COURT: Go ahead. Sorry.

MR. PISTILLI: Oh, just two things.

THE COURT: Go ahead.

MR. PISTILLI: First on the refusal to produce witnesses in Brooklyn. There's only one witness we refused to produce in Brooklyn which is a third party who lives in a different judicial district and we said it's got to happen there. We think that was appropriate and in fact Mr. Goldberger agreed I think, suggested that's right.

THE COURT: Well, the --

MR. PISTILLI: Everyone else he's essentially said to us the burden is on us to show him why these witnesses are unable to travel to Brooklyn. We just don't think that's the law. We don't think -- you know, a corporation is to be deposed presumptively at its headquarters which in this case would be the Town of Oyster Bay. And I point Your Honor --

THE COURT: Is it its headquarters or is it within the judicial district where its headquarters sit?

MR. PISTILLI: There's a presumption for corporations including municipal corporations to be deposed at their headquarters. We can point you to --

THE COURT: Don't point me now because I'm not going to give you a ruling now so it's not going to help you. Work out what you can. If not, that one you can do with three-page letters. I'll take a look. Cite your cases. I'll look at the cases. I'm always willing to learn new stuff. And we'll go from there. But that one you should be able to do toot sweet. I'd like you to whittle it down to as few a number as you can and we'll go from there. Otherwise let's plan to see each other in six weeks.

MR. GOLDBERGER: Sounds good, Judge. Judge, one other thing I just wanted to alert --

THE COURT: Oh yes. Sorry.

MR. GOLDBERGER: -- the Court to. That's okay. There's one other thing I want to alert the Court to, and Mr. Pistilli is aware of this. We have been informed that there is another lawsuit coming from the state on this very subject. It's going to be filed in state court and the --

THE COURT: From the AG?

MR. GOLDBERGER: By the AG. No, by the Division of Human Rights. So the ramifications of that, we're not quite sure what it'll be yet. We suggested perhaps to counsel that that might be a good time to talk settlement over we have heard nothing back in that regard.

THE COURT: Okay. Mr. Pistilli, you'll evaluate as it comes and assuming you're counsel on that lawsuit too, we're open to assisting and if there's a chance to settle everything at once here, I am open to that even though we don't have jurisdiction over all of it. I think a global settlement is always better. Let me know. All right. Anything else?

MR. GOLDBERGER: Nothing, Your Honor.

MR. PISTILLI: Nothing, Your Honor.

THE COURT: All right. Thank you all.

MR. GOLDBERGER: Thank you very much, Your Honor.

THE COURT: We are concluded.

(Proceedings concluded at 2:11 p.m.)

* * * * * *

I certify that the foregoing is a court transcript from an electronic sound recording of the proceedings in the above-entitled matter.

Mary Greco

Dated: November 20, 2015